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No. 97-79 (2)

In The

Supreme Court Of The United States

October Term, 1996

IN THE INTEREST OF: THE CHILDREN FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM
Petitioner

v.

MR. DOE AND MRS. DOE
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF *AMICI CURIAE*: ALLIANCE FOR THE RIGHTS OF CHILDREN (ARCH), ALLIANCE FOR SOUTH CAROLINA'S CHILDREN, CHILD, INC., CHILD ABUSE FORENSIC INSTITUTE, ECLIPSE, JOINING TOGETHER TO STOP SEXUAL ABUSE, JUSTICE FOR CHILDREN, MARILYN VAN DERBUR INSTITUTE, INC., MOTHERS AGAINST SEXUAL ABUSE (MASA),

(*AMICUS CURIAE* CONTINUED ON NEXT PAGE)
IN SUPPORT OF THE PETITIONER

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35 pp

(LIST OF *AMICI CURIAE*, CONTINUED)

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD, NATIONAL COURT APPOINTED SPECIAL ADVOCATE ASSOCIATION (CASA), NATIONAL TASK FORCE ON CHILDREN'S CONSTITUTIONAL RIGHTS, NATIONAL VICTIM CENTER, ONE VOICE/AMERICAN COALITION ON ABUSE AWARENESS (ACAA), SURVIVORS AND VICTIMS EMPOWERED (SAVE), SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE & SEXUAL ASSAULT, SOUTH CAROLINA EDUCATIONAL RESOURCE CENTER FOR MISSING AND EXPLOITED CHILDREN, SOUTH CAROLINA NURSES ASSOCIATION

IN SUPPORT OF PETITIONER

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

The ruling of the court below and its resolution profoundly effects the diverse legal interests of the many children in this nation, including those of which are victims and alleged victims of physical abuse, sexual abuse, neglect and mental injury. The amici are in a position to present the issues in a broader and different perspective than the parties to this action.

The Petitioner consents to the filing of this amicus brief. The Respondents have withheld consent, necessitating this motion.

II. IDENTITY AND INTERESTS OF AMICI CURIAE

1) Alliance for the Rights of Children (ARCH), based in Virginia, is an incorporated nonprofit child advocacy organization dedicated to the protection of children from sexual abuse through public education and advocating for changes in public policy. ARCH is keenly aware of the system failures which can occur in instances where abuse occurs in the family. Its President is Glennie Rohelier.

2) Alliance for South Carolina's Children, based in Columbia, South Carolina is an independent, nonprofit, multi-issue child advocacy organization. The Alliance conducts research, offers community programs, distributes an annual "KIDS COUNT" report, supports legislation to protect children, and promotes increased public awareness of issues affecting children and families. Its President is John S. Niblock.

3) CHILD, Inc., also known as Children's Healthcare Is a Legal Duty, Inc. is a tax-exempt national membership organization founded in 1983 and based in Sioux City, Iowa. With a board of directors comprised of medical doctors, mental health professionals, attorneys and business people, Child, Inc. promotes the constitutional rights of children and maintains that child abuse and neglect violates children's constitutional rights. Its President is Rita Swan, Ph.D.

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public and professionals regarding child abuse allegations. CAFI also provides professional forensic services in cases in which child abuse has been alleged. Its Executive Director and legal counsel is Seth Goldstein, Esq.

5) ECLIPSE (Emancipating Children from Legal Injustice, Pornography & Sexual Exploitation), based in South Carolina, is a national nonprofit corporation which provides legal, investigative and other professional assistance in severe cases of child abuse and trauma. ECLIPSE has an interest in representing the interests of child victims of severe child abuse, sexual abuse and trauma. Its President is Robert L. Millard.

6) Joining Together to Stop Sexual Abuse (JTSA), is a nonprofit organization based in Cleveland, Ohio and founded in 1993 through the combined efforts of attorneys, social workers, mental health care professionals, educators, adult survivors of child sexual abuse and concerned citizens dedicated to eradicating sexual abuse, proactively preventing child sexual abuse, and countering the effects of the backlash against survivors and child advocates. JTSA's Board President is Rhonda F. Day, MSSW.

7) Justice For Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. Formed in 1987, JFC advocates the interests of abused and neglected children whose cases have been lost in the child welfare, family court, and/or criminal justice systems. JFC has an interest in more fully presenting the impact of the lower court's decision on all child victims of physical abuse, sexual abuse, and neglect. JFC's president and legal counsel is Randy Burton, Esq.

8) Marilyn Van Derbur Institute, Inc. ("MVDI"), based in Denver, Colorado, was founded by spokesperson and 1958 Miss America Marilyn Van Derbur. Ms. Van Derbur, also a co-founder of One Voice, repressed her memories as an incest survivor until age 24 and has spoken publicly in an effort to stop the sexual exploitation of children. MVDI has an interest in the petition by more fully presenting to the court the subject matter of child sexual abuse as it relates to the legal issues in this case.

9) Mothers Against Sexual Abuse ("MASA"), based in Monrovia, California, is a national non-profit organization founded for purposes of educating society on the occurrence and debilitating effects of child abuse, supporting legislation to protect children, and providing resources for victims and families. MASA has an interest

in more fully representing the legal interests of child victims of sexual, physical and emotional abuse. Its president and founder is Claire R. Reeves.

10) National Association of Counsel For Children (NACC), located in Denver Colorado, was founded in 1977 to promote quality representation for children in the legal system. The NACC's mission is to improve the legal protection and representation of children by training and educating child advocates and by effecting policy and legal system improvements. With a membership of attorneys and judges, as well as representatives from the fields of medicine, mental health, social work and education, NACC interest in this case is enhancing the well-being and protecting the legal rights of children nationwide. NACC's Executive Director is Marvin Ventrell, J.D.

11) National Court Appointed Special Advocate Association (CASA), based in Seattle, Washington is the national membership organization, and technical assistance and training provider for volunteer CASA and Guardian ad Litem programs throughout the United States, networking almost 700 programs in all fifty states. National CASA advocates the best interests of abused and neglected children in the courts, promotes quality volunteer representation for children, and seeks to provide each child a safe, permanent and nurturing home.

12) National Committee on the Rights of the Child works to improve the legal status of children by undertaking carefully selected precedent-setting litigation aimed at establishing the constitutional and legal rights of children. One of its fundamental purposes is to end the denial to children of constitutional procedural rights, with the goal of establishing the right of children to access to courts to protect themselves in every significant way. Dedicated to establishing that children are "persons" under the United States Constitution and entitled to the fundamental protective rights contained in the Bill of Rights, NCRC has an interest in the petition by more fully presenting to the Court the need to recognize the constitutional rights of children. Its President is Ted Steege.

13) National Task Force for Children's Constitutional Rights was founded in 1988 by Connecticut Superior Court Judge Charles D. Gill and Dr. Anne Burgess of the University of Pennsylvania. The Task Force is a multi-disciplinary organization with membership in fifty states and has appeared as amicus curiae in appeals in state and federal courts where the constitutional rights and interests of

children are at stake. The Task Force has an interest in more fully demonstrating to this court the need for granting review in this case to decide issues of compelling public importance involving the constitutional rights of children.

14) National Victim Center ("NVC"), a nonprofit organization based in greater Washington, D.C., is a leading advocate for victims of violence. NVC promotes the responsiveness of the criminal and civil justice systems to the rights and needs of crime victims, and works to increase public awareness concerning their plight. NVC has been the pioneer in advocating the restorative justice for crime victims through the civil justice process.

15) One Voice/ACAA ("One Voice"), based in Washington, D.C., is a national non-profit organization formed to improve the quality of life for children and adult survivors of incest, sexual abuse, and physical and emotional abuse, through public education, advancements in law, justice and public policy. One Voice has an interest in assuring that the issues relating to child abuse, incest and sexual abuse can be more fully presented. American Coalition For Abuse Awareness ("ACAA"), is the public policy project of One Voice. One Voice/ACCA's president is Sherry Quirk, Esq.

16) Survivors And Victims Empowered ("SAVE"), based in Pennsylvania, is a nonprofit organization formed to prevent the criminal neglect and physical, emotional and sexual abuse of children and assists adult survivors of childhood trauma. SAVE has an interest in more fully presenting the impact of the lower court's decision upon child victims of physical abuse, sexual abuse and neglect. Its executive director is L. Philip Sheldon, Jr.

17) South Carolina Coalition Against Domestic Violence & Sexual Assault, based in Columbia, South Carolina and formed in 1981, is a state-wide organization which monitors and influences policy and legislation on domestic violence and sexual assault issues, and promotes awareness of the prevalence of family violence against children, women and men. Its Executive Director is Susan Higginbotham.

18) South Carolina Educational Resource Center For Missing and Exploited Children, based in Greenville, South Carolina, and founded in 1984, provides a centralized training and referral service addressing missing and exploited children and related family issues. The Center has an interest in protecting exploited children in the state of South Carolina.

19) South Carolina Nurses Association, is a constituent member of the American Nurses Association based in Columbia, South Carolina. It is a membership organization comprised of registered nurses, to support professional goals and responsibility in the field of nursing for registered nurses and serves as an advocate for the interests of nursing patients and clients.

III. ARGUMENT ON THE MOTION

The prevalence of child abuse, child sexual abuse, and neglect in this country is astounding and worsening. Last year, the U.S. Department of Health and Human Services reported that an estimated 3 million American children were abused or neglected, twice as many as five years earlier. Proclamation No. 6981, 62 Fed. Reg. 16035 (1997). Almost half a million of our nation's children were seriously injured due to child abuse and neglect, quadruple the number of the previous year. Our president has declared that "we must not let this senseless suffering continue". *Id.*

The nineteen amici curiae are all committed to protecting the rights of children and preventing child abuse. Without the commitment, knowledge and assistance of these organizations, many more children would find themselves victims of physical abuse, sexual abuse and neglect. The expertise of the amici in the areas of children's law, children's constitutional rights, and the subject matter of child abuse will provide the Court with a much broader perspective of the issues raised in the petition. It is respectfully requested that this Court grant the request of the amici for leave to file the annexed amicus brief.

THE AMICI CURIAE

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IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Equal Protection and Due Process Clauses of the 14th Amendment prohibit appellate courts from remanding protective custody cases on the basis of staleness simply because time has elapsed while on appeal?

II. Whether children in protective custody cases are constitutionally entitled to meaningful appellate review of a judicial bias claim under the equal protection and due process clauses of the 14th amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	I
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
IDENTITY AND INTERESTS OF THE AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	6
ARGUMENT	
I. THE ISSUES PRESENTED BY THIS CASE ARE OF CRITICAL IMPORTANCE TO CHILDREN	9
II. CHILDREN HAVE A FUNDAMENTAL RIGHT TO MEANINGFUL APPELLATE REVIEW OF THEIR CLAIMS OF JUDICIAL BIAS NOTWITHSTANDING ISSUES OF STALENESS CAUSED BY THE APPELLATE PROCESS ITSELF	11
CONCLUSION	19

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UNITED STATES CONSTITUTION

Article IV 10

First Amendment 10

Fourteenth Amendment 13, 15

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S.C. Code Ann. §20-7-736 (1976) 7

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428 U.S. 52 (1976) 9

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BRIEF OF *AMICUS CURIAE*

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1. In accordance with Rule 37.6, counsel for amici represents that: he alone authored the argument portion of this brief without any monetary compensation or reimbursement whatsoever; attorney Helen L. McGonigle prepared the paragraphs describing the identity and interests of the amici curiae; and amicus ECLIPSE provided a monetary contribution towards the printing costs for this brief.

mental health professionals, attorneys and business people, Child, Inc. promotes the constitutional rights of children and maintains that child abuse and neglect violates children's constitutional rights. Its President is Rita Swan, Ph.D.

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15) One Voice/ACAA ("One Voice"), based in Washington, D.C., is a national non-profit organization formed to improve the quality of life for children and adult survivors of incest, sexual abuse, and physical and emotional abuse, through public education, advancements in law, justice and public policy. One Voice has an interest in assuring that the issues relating to child abuse, incest and sexual abuse can be more fully presented. American Coalition For Abuse Awareness ("ACAA"), is the public policy project of One Voice. One Voice/ACCA's president is Sherry Quirk, Esq.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Boswell questioned support for a cause which one knows to be bad, Dr. Johnson replied:

> Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a

cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong and he is right. H. Boswell, *The Life of Johnson*, p. 47 (Hill ed. 1887).

In the present action, the petitioner on behalf of the children for whom she is guardian ad litem seeks to have this court require that the South Carolina Supreme Court review the children's claim of judicial bias instead of remanding the underlying case to the same judge against whom the children lodge their allegation of bias. Amici support this claim for relief, in the interest of these children and others similarly situated, to subject the factual determinations underlying the trial judge's decision to the crucible of meaningful appellate review.

South Carolina requires that the department of social services prove a case of abuse and neglect of children by a preponderance of the evidence. S.C. Code Ann. 20-7-736 (1976); *Aiken County DSS v. Wilcox*, 304 S.C. ___, 403 S.E.2d 142 (Ct. App 1991). Unlike Johnson's England, South Carolina grants broad discretion for its appellate courts to find facts based upon the reviewing court's own view of the evidence presented. See *Horton v. Vaughn*, ___ S.C. ___, 423 S.E.2d 543 (Ct. App. 1992); *Aiken County DSS v. Wilcox*, supra; *S.C. DSS v. Forrester*, 282 S.C. 512, 320 S.E.2d 39 (Ct. App 1984). Under South Carolina law, the children are not necessarily "wrong" and the judge "right".

Although the South Carolina Court of Appeals acknowledged that: "the record reflects much evidence supporting physical and sexual abuse had the Family Court

made such a finding"; Petition App. 7A; and expressed its concern about parental neglect and the children's "disturbing familiarity with sexual matters beyond their years"; Petition App. 8A; and, the South Carolina Supreme Court expressed its concern "about the disturbing evidence presented at trial"; Petition App. 3A; neither court exercised its authority and responsibility to provide the children with meaningful appellate review of their claims.

This Court has indicated that special vigilance is necessary when the victims of a discriminatory governmental practice are children, who have no representation in the government[2]. See *Plyler v. Doe*, 457 U.S. 202, 218, n. 14 (1982); (*Bellotte v. Baird*, 443 U.S. 662, 643 (plurality opinion) (concluding that states may not impose undue burdens on minor's exercise of constitutional rights).

The courts of South Carolina have ignored the rights of these children to meaningful appellate review of facts found by a trial judge whom their guardian claims showed egregious bias. The trial judge made findings of fact;

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2. Children do not hold office, cannot vote, and possess no other direct access to government and political institutions that formulate public policy. First Lady Hillary Rodham Clinton wrote: "Lacking even the basic power to vote, children are not able to exercise normal constituency powers, articulating self-interests to politicians and working toward specific goals... The causes of younger children have not fared well, partly because these representatives [that children must rely on to speak for them] have loyalties diluted by conflicts between children's rights and their own institutional and professional goals." Hillary Rodman, *Children Under the Law*, 43 Harv. Educ. Rev. 487 (1973). Accordingly, children depend upon the courts to recognize and protect their basic rights. A lack of bias is an essential prerequisite of such protection.

Petition App. 19A-24A; that the petitioner illustrates contradicted the content and weight of the evidence at trial; Petition pp. 5-8. Moreover, the trial judge demonstrated on the record his bias by remarking that: "[t]his court must be cognizant of the inherent unreliability of evidence presented of children this age and of their susceptibility to acquiring matters from their environment and encoding such matters to their experience." Petition App. 22A. Upon reconsideration at the request of both DSS and the guardian, the trial judge remarked further: "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry." Petition App. 28A.

I. THE ISSUES PRESENTED BY THIS CASE ARE OF CRITICAL IMPORTANCE TO CHILDREN

Cases such as this will not go away. State courts are reaching inconsistent results based at least in part on divergent understandings of this Court's decisions concerning the rights of children and parents. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

Conflicting interpretations and uncertainties about the impact of this Court's decisions concerning the rights of children and their parents threaten the well-being and even the lives of children. Decisions returning a child to abusive parents unambiguously ignore the child's rights, needs and interests. They do so without consideration of, or even mention of, the holdings of this Court that a child is a 'person' protected by the Constitution. By leaving the child out of the equation, the decisions propagate the traditional

adult-centered perspective within family law which myopically analyzes only the rightness or wrongness of conduct by the competing adults and have not incorporated the fundamental principle that a child is a person.

Among the constitutional rights guaranteed to children and adults alike is the right to seek access to courts; see Tribe, *American Constitutional Law,* 2d ed. 10-18 (1988); based upon the 1st amendment, the due process clause of the 14th amendment, and the privileges and immunity clause of Article IV. *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), cert. denied, 474 U.S. 1032 (1985). This Court has extolled the right of access as a fundamental right protected by the Constitution.

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148 (1907).

Neither a well-meaning adult who professes to have the child's "best interest" as a priority, nor a court which has a parens patriae interest in promoting children's welfare is sufficient. "For human dignity, the difference between the state's interest and the children's own interest is critical." Tremper, *Respect for the Human Dignity of Minors*, 39 Syracuse L.Rev at 1335 n. 250. Even concern for the parents' rights in this case does not bar meaningful appellate review of the guardian's bias claim. The children have been returned to their custody and will likely remain with the parents during the pendency of this appeal and any remand. The burdens of litigation placed upon the parents and the South Carolina courts are light when compared to the heavy

burden of children living in circumstances evidenced at trial and deprived of their opportunity to be heard fairly.

Justice Frankfurter observed: `The history of American freedom is, in no small measure, the history of procedure.' *In re Gault*, 387 U.S. 1, 20-21 (1967). Children experience manifest injustice when they are denied the opportunity for meaningful appellate review of claims of bias expressed in an optical-illusion-like focus on highly disputed facts presented in highly charged ideological terms, such as evoking the specter of the "child sexual abuse industry". The illusion of a fair hearing appears and then disappears absent a fully contextualized understanding. In the present case, the children are denied even an unbiased forum in which they can assert their interests. The anchoring principle of including the child as a person in the constitutional analysis would prevent the outcome from being determined by which ideological eye is cast upon the matter.

Amici submit that there is a compelling national interest in grant of certiorari so that this Court can consider, in a fully contextualized way, the extent and consequences of the treatment of children as property and not as persons in this and similar cases.

II. CHILDREN HAVE A FUNDAMENTAL RIGHT TO MEANINGFUL APPELLATE REVIEW OF THEIR CLAIMS OF JUDICIAL BIAS NOTWITHSTANDING ISSUES OF STALENESS CAUSED BY THE APPELLATE PROCESS ITSELF

More than 25 years ago this Court stated: "Whatever may be their precise impact, neither the 14th Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387

US 1, 13 (1967)[3]. This Court has determined that children "are 'persons' under our Constitution" and are "possessed of fundamental rights which the State must respect." *Tinker v. Des Moines School District*, 393 US 503, 511 (1969). As other of this Court's decisions hold, the fact that a person may not be able to act or choose autonomously is not dispositive, and "competence" in the usual adult sense is not a prerequisite to possession of constitutional rights. *City of Cleburne Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); see also *Cruzan v. Director, Missouri Dept. of Health*, 497 US 261 (1990). This Court has not determined the implications of this fundamental principle as it bears on the protection due children's appellate rights. This case squarely presents that issue.

An experienced Connecticut state court judge recently wrote, "It is ironic that although corporations in the United States have long been held to be persons,' and thus are eligible for constitutional protection, the extent to which children, as individuals, have comparable constitutional rights is still not entirely clear." Charles D. Gill, *Essay on*

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3. Although *In re Gault* arose in the context of delinquency proceedings, this seminal decision has served as the foundation for the extension of constitutional protections to children in civil as well as criminal or quasi- criminal proceedings. The Court in *Gault* recognized that the civil-criminal dichotomy is often merely a talismanic rationalization for lesser procedural standards and instead determined that the proper inquiry concerns the substance of the exercise of power by a court. Even the dissent recognized that "[a] State in all its dealings must, of course, accord every person due process of law." (Emphasis added.) *In re Gault*, 80 (Stewart, J., dissenting). See also, J. Goldstein, A. Solnit, S. Goldstein and A. Freud, The Best Interests of the Child: The Least Detrimental Alternative (1996).

the Status of the American Child 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?, 17 Ohio Northern L. Rev. 543, 548 (1991). Amici assert that because a child is a 'person', it is relevant, in making custody decisions, how loss of that recognition as a person could affect both his or her well-being if not life itself.

As a "person" a child is protected by the Fourteenth Amendment to the United States Constitution. Among the fundamental elements of protections of the 14th Amendment is access to meaningful appellate review.

Childhood is a social process. The legal process can be reversed, but the social process cannot. Children must not wait for a court to tell them that they should have not have been abused sexually after they have already suffered the irreversible consequences of parental inaction. Interfering with the child's safety violates the child's rights. It treats him and his rights as constitutionally less significant than his caretakers and their rights. The child is reduced, thereby, to an instrument to serve the caretaker's needs, however perverse.

When faced with resolving a conflict between people who all have interests of constitutional magnitude, a court should "consider the positions of the parties' the significance of their interests, and the relative burdens that will be imposed by differing resolutions." *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992). Instead, South Carolina treats only the parents and trial judge as having rights while children are treated in the same manner as property to be owned, without independent human rights.

Meyer v. Nebraska, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), still much cited in defense of parents' rights, are grounded in notions of

children as property. *Meyer* and *Pierce* were "authored and joined by the Court's most inflexible laissez-faire conservative and grounded on economic substantive due process precedents." Barbara B. Woodhouse, *"Who Owns the Child?" Meyer and Pierce and the Child as Property*, 33 William & Mary L. Rev. 995, 1042 (1992). "[I]n *Meyer* the court vindicated the 'liberty' to control another human being . . ." Id. at 1099 n.577. As Governor Pierce of Oregon said during this Court's consideration of *Pierce*, "[I]t is a strange perversion of the word 'liberty' to apply it to a right to control the conduct of others." Id. at 1042. Although *Matter of Marriage of Ross*, 783 P.2d 331, 338 (Kan. 1989) arose in the context of a dispute over paternity testing, the Kansas Supreme Court noted the priorities to be set in resolving conflicts of rights: "Although someone may suffer, it should never be the child, who is totally innocent and who has no control over or conception of the environment into which he or she has been placed." Id. at 339.

This Court has itself recognized that harm to children's mental and emotional development involves injuries that cannot be reversed or remedied. *Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1332 (1980) (irreparable harm to children of not being able to attend school; recognizing that developmental, emotional and behavioral damage to children cannot be repaired by a future legal remedy). The unique nature of the threatened harm to children situated as are these far outweighs the possible detriment to the adult parties, as recognized by the priority historically accorded to protecting vulnerable children. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Hammer v. Dagenhart*, 247 U.S. 251 (1918)(Holmes, J., dissenting).

Children have an interest in being protected from harm whether the harm comes from neglect or from the sexual abuse of their care givers. In *Parham v. J.R.*, 442 U.S. 584 (1978), this Court noted that, regardless of the state's respect for parental authority, and parental rights, "we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." Id. at 604 (emphasis added).

This case is part of a necessary paradigm shift in the law from children-as-chattel to children as rights-bearing people. The constitutional principles underlying this shift are well established. Courts, relying on tradition, have failed to apply them consistently to children. To the extent that case law reflects ideas of children-as-chattel instead of children-as-persons and has failed to consistently apply basic constitutional principles to children, the case law is due for a change. "The paucity of substantive law concerning the rights of minors in such matters as divorce, custody, juvenile delinquency, and mental health commitments may be attributable to the lack of independent representation in such proceedings." James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. C.R.C.L. Law Rev. 565 n.2 (1976).

Our legal concepts constantly change to reflect the growth of society's values, and such change is proper. As the 11th Circuit pointed out in extending the protection of the fourteenth amendment to children in foster care:

The fourteenth amendment, like the eighth amendment, `must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 US 86, 101 (1958). With

contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds. *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987). See also, *Brown v. Chastin*, 416 F.2d 1012, 1027 (5th Cir. 1969) (Rives, J., dissenting)("a change of parental bondage during the tender years is hardly less upsetting of one's pattern of life than is the denomination and possible commitment of a child as a `juvenile delinquent' . . . .").

In breaking with common law tradition the Court will act consistently with well recognized fundamental constitutional and human rights principles and discard those portions of tradition which are inconsistent with the principles. Recognizing a child's right to meaningful appellate review recognizes the human dignity of minors.

To incarcerate a person without according a full panoply of due process rights violates our fundamental constitutional beliefs. A fortiori, the case of these children in a protection proceeding involving allegations of neglect and sexual abuse before a biased decision maker can be similarly characterized. Whatever rights the children may have go for naught if they are bound by bias. The right to meaningful appellate review is the only assurance that these children's interests and statutory and constitutional rights will be realized. The record in the proceedings below reflects confusion, unfairness, arbitrariness and victimization.

In ascertaining the "best interests" of the children in the heated struggle between these parents and the State, the trial court turned a deaf ear to the best available evidence -

the voices of the children. Children often complain that adults will not listen.

"When a child requests a reason or explanation concerning a particular restriction, at least two responses are open to a parent [or trial court judge]. On the one hand, the parent may fulfill the request and demand compliance; on the other, the parent [or trial court judge] may ignore the child's inquiry. From the child's perspective, this is essentially the difference between the expression of legitimate and coercive power." Elder, *Parental Power Legitimation and Its Effect on the Adolescent,* reprinted in Goldstein and Katz, *The Family and the Law* (1965), 980. In the legal context, the need to be listened to is realized through the "opportunity to be heard."

This paradigm shift in recognizing the legal status of children is similar to other paradigm shifts in this nation's history. It is at once a major change and yet at the same time simply a more consistent application of our professed principles. "Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education.*" *Eastway Construction Corp. v. New York*, 637 F. Supp. 558, 575 (E.D.N.Y. 1986).

At this Nation's founding, the Founders proclaimed it as "self-evident" that "all men are created equal," and yet felt it obvious that African American men were "different," such that a black man had no rights which a white man was bound to respect. See *Dred Scott v. Sanford*, 19 How. 393 (1857). It was also obvious that women, of any race, were "different" and therefore could be denied the rights guaranteed to "all persons" -such as the right to vote.

(Shortly after ratification of the 14th Amendment, which promised all citizens equal protection of the laws, the U.S. Supreme Court upheld an Illinois prohibition against women becoming lawyers. *Bradwell v. Illinois*, 16 Wall. 130 (1872).)

African Americans, women and children have in common the history of being treated essentially as property and as exceptions to the social contract upon which our founding documents declared this nation to be based. In each case, the articulation of the principle that members of each group were constitutional "persons" came well before society in general and the legal system actually treated them as such.

Just as for African Americans and women, steps toward progress for children have not come easily or without protest and resistance. For example, we now take for granted the child labor laws passed during the early twentieth century. At the time, however, some religious leaders and conservative political forces opposed such laws as unwarranted governmental interference in the economy and the privacy rights of the family. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Robert H. Mnookin, Child, Family and State* 646-68 (1978).

One scholar notes that "from Roman times to the mid-nineteenth century [children] were treated as something akin to property and had rights which might be characterized as falling somewhere between those of slaves and those of animals." Cohen, *Relationships Between the Child, the Family, and the State, in Perspectives on The Family,* 293 (M. Bayles, R. Moffit & J. Greie, eds. 1990).

American attitudes toward the treatment of children did not begin to change until the end of the nineteenth century.

Dennis P. Ichikawa, *An Argument on Behalf of Children*, 2 Child Maltreatment 202 (Aug. 1997); Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children's Rights*, 46 Am. Psychologist 53 (Jan. 1991). Even then, the Society for the Prevention of Cruelty to Animals was founded before a similar society to protect children.

"Tradition" could not sanctify slavery or segregation or disenfranchisement of women or discriminatory treatment of children born out of wedlock. It cannot sanctify treatment of children as stale chattel subject to sexual abuse. The vital claims raised by these children cry out for an unbiased hearing.

CONCLUSION

Due respect for the personhood and human dignity of children - the characteristics that distinguish them from property, which can be shunted about depending on claims of ownership, requires that we respect the appellate rights of children. They have only one childhood in which to accomplish all the tasks and meet all the challenges involved in growing up. They do not go into suspended animation while adults write appellate briefs.

The decision of the South Carolina courts only balanced, weighed, and judged the interests of contending adults rather than acknowledging that children have interests worthy of consideration. They treated the children as property. The U.S. Constitution, with its emphasis on the human dignity of all persons, requires more.

A meaningful opportunity to be heard surely requires that the courthouse doors be open to children seeking, through their guardian, the help of an appellate court system

to protect them in their vulnerability. The right to the opportunity to be heard is meaningless if the guardian is unable to speak for children before an unbiased tribunal.

Accordingly, amici respectfully request that this Court grant the petitioner's petition for writ of certiorari and undertake review of this case on the merits.

Respectfully submitted,

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